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Criminal Law and the Nation State

The relation between the state and criminal law in Sweden during the 19th and early 20th centuries

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1 Introduction

Many scholars have been working with questions connected to the theme criminal law and nation state. This article will focus on one of the aspects of the theme, and study the relation between the creation of the modern democratic national state in Sweden and the shaping of the criminal system into a more individualistic and preventive construction. More specifically, I will look into the Swedish social welfare system to see how criminal, social and constitutional reforms during the 19th and 20th centuries are closely linked and interrelated as three aspects of a massive remake of the Swedish society. The finding will be ascribed to Charles Tilly's book *Coercion, Capital and European States, AD 990 – 1992* (1992).[1] Tilly's work covers a broad time period, and he has studied the development of the national state from a political historic perspective. From my legal historical perspective, I will argue that the change in criminal law already in the early 19th century was closely connected with the development of the basics of legal protection of the rights of citizens, and that the development of criminal law followed the historical development of the modern national state.

However, the development was not linear. Especially in the borderland between the criminal system in a strict sense, and the administrative actions against individuals and social groups that were considered as a threat to the community, we can identify efforts that were more compatible with actions accepted in an authoritarian state than in a modern democratic European state.

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1 Tilly, *Coercion, Capital and European States, AD 990 – 1992*, (Blackwell, 2nd ed., 1992).

2 Legal reforms in Sweden in the 19th century

During the 19th century, Sweden developed from a dynastic state to a modern national state. The process started with the collapse of the regime of king Gustav IV Adolf at the end of the war with Imperial Russia in 1809. The subsequent peace divided the old Swedish kingdom, and the eastern part (Finland) was ceded to Russia. This was a major national crisis and a threat to state authority and stability. The elite in the Swedish society – mostly state officials, officers and members of the administration – tried to in a way reinvent Sweden in the period after the collapse of king Gustav IV Adolf's regime. As a consequence of the peace with Imperial Russia, Sweden became a national state in a more modern sense than the earlier dynastic kingdom. From now on the national borders circled a country with a common language, religion and culture.

The provinces across the Baltic Sea were lost and the age-old political bonds with Finland were severed. A new fundamental law was created – the Instrument of Government of 1809, a new royal dynasty was invited and the old legal system was openly criticised as being too old and traditional. The new constitution was partly influenced by power sharing ideas and the monarchical system had to work in new and more restricted ways. The institutions of the government, king and diet shared the lawmaking power, and this meant that laws came to use as a modernising instrument in a way that was new to Sweden.

During the later part of the 19th century, the political development further reduced the influence of the monarchy. An important step was taken in 1866, when the old diet was replaced by a bicameral assembly, increasing the importance of the *Riksdag*.[2]

Reforms had also been introduced on a lower level of the state organisation. An important step to make local government more effective was taken in the 1850s, and gradually the local assemblies became more democratic.

The Swedish administration was loyal to this development, and took part in the reforms. The state philosophy of Kristofer Boström gave this development a theoretical support: In the theories of Boström, the state was considered as a more or less Supreme Being.

It is impossible in this context to avoid a short discussion on the position of citizens' rights in Sweden during the 19th century. In the Instrument of Government of 1809, a rather short article concerning the relations between the executive and the individual citizen had been introduced, but these rules were not far reaching. They were written in an archaic language and they had historical roots in the ceremonial oaths sworn by the kings during the middle ages.[3]

[2] von Sydow, *Parlamentarismen i Sverige. Utveckling och utformning till 1945*, (Gidlunds Förlag 1997), p. 52 ff. Stjernquist, *Tvåkammartiden. Sveriges riksdag 1867–1970*, (Sveriges Riksdag 1996), p. 26.

[3] Häthén, *Stat och straff. Rättshistoriska perspektiv*, (Studentlitteratur 2004), p. 195.

The Freedom of the Press ordinance from 1812 regulated an important part of the freedom of expression, but in general the legal protection of the citizens' rights was weak and sometimes uncertain. I think the example of the vagrants and the poor is an obvious example of this. People belonging to these groups were not even guaranteed personal freedom, a right of free movement or a right to settle where they wanted in the country. Sweden remained controlled during the early phase of the century by the traditional established social powers of the church, the local and provincial administration and the family.

During the mid 19th century, liberal ideas won support in the *Riksdag* and a number of classic liberal rights were introduced concerning property, entrepreneurship, and freedom of trade. The age-old guilds were abolished and capital controls were lifted. It took somewhat longer to expand the political rights, as we shall see in the next section, but political parties were established already from the 1880s.

The Swedish procedural system was based on the participation of lay members as co-judges in the courts of the first instance. This was a very important aspect of the legitimacy that the Swedish criminal system enjoyed, and a ultimate restriction of the power of state officials. It made it important to write the criminal rules in a clear way so that the farmers as co-judges really understood what they were doing during the procedure. In a way the tradition from the code of 1734 was continued in keeping the legal language close to the everyday language, and preventing it from developing an exclusive terminology. Paradoxically this strengthened and guaranteed the popular acceptance of the coercive and punishing power of the state.

But already in 1809 the diet noted that the criminal law urgently needed a reform. Both the description of crimes and offences and the design of the punishments were old-fashioned or even obsolete. The diet decided to assign to a committee the task of preparing a complete modernisation of the code of 1734. The committee started its work in 1811, and it was strongly inspired by the French code pénal of 1810. But as the years went by, the reform of the legal system was also influenced by other continental ideas, and the work of Anselm von Feuerbach played an important role during one stage. The law committee published its proposal in 1832, and the text was quite modern and the reform ambitious. The obsolete crimes had been eliminated from the list of crimes, and a number of the old punishments were abolished.

It is obvious that the law committee tried to harmonise the content of the criminal law with the political change in Sweden. The power of the state was to be checked and controlled in various ways. These ideas could be seen already in the new constitution, but by creating a new criminal system, the legal powers of the state to punish its citizens were also limited and checked. The proposal was radical, as the committee proposed a more general use of prison sentences and forced labour. This can be seen as an egalitarian tendency but also as openness to liberal influences. The committee did not consider it as realistic to propose an abolishment of the capital punishment in the main text. Howev-

er, the abolishment of the capital punishment was presented in an alternative proposal. Some basic principles such as the principle of legality, of equality and of proportionate punishments, were included in the proposal. Furthermore, in the *travaux prepartoire* the committee stated that the punishment should be seen as something more than purely a public revenge. The punishment should respect the human dignity of the criminal and have an element of rehabilitation besides functioning as a deterrent.[4]

In the 1830s, the general political opinion turned more conservative and the radical ideas of the proposal were met with scepticism. The proposal failed to be accepted and the old system was left unchanged for the time being. The reform ideas were however not lost, and gradually conservative lawyers and politicians accepted the ideas of the proposal. A number of smaller but important reforms were introduced during the 1840s and 1850s. During this time liberal ideas became more popular, and in 1864 the liberal government and the diet issued a new criminal code founded on the ideas of the proposal of 1832. Technically, the new law was a somewhat less ambitious version of the old proposal. The death penalty remained in the law as an ultimate punishment, but it was in all cases exchangeable with lifelong imprisonment. Many members of the Diet opposed the inclusion of capital punishment in the law. They considered it as inhuman, legally dubious and in contradiction to the respect of the rights of the citizens. We can see this crucial debate as important in establishing the definitive limits for the coercive powers of the state. The legal system and the courts understood the *Zeitgeist*, and the use of capital punishments was radically reduced. During the period until it was finally abolished in 1921, only about 15 criminals were executed.[5]

The new criminal code of 1864 can be seen as a Swedish version of the many continental criminal codes that had been implemented during the period from 1830 to 1860. The criminal codes had been written and implemented in a European era of constitutional development and technical evolution of the criminal legal science. With these laws the Swedish criminal code shared many of the basic principles I have mentioned above, but some aspects were undeveloped from a legal scientific point of view.[6]

One important aspect of the criminal law discussion was how to model the prisons. In the mid 19th century it was obvious that prison sentences were to replace the older outdated penalties, but it was considered as expensive to build new prisons. To keep a single prisoner isolated in one cell without productive activities, could be seen as a waste of public money. A short text discussing the best way to organise and design prisons in Sweden was published in 1840. It was an anonymous text, but soon it became publicly

4 Häthén, *Straffrättsvetenskap och kriminalpolitik. De europeiska straffteorierna och dess betydelse för svensk strafflagstiftning 1906 – 1931*, (Lund University Press 1990), p. 196 ff.

5 Seth, *Överheten och svärdet. Dödsstraffsdebatten i Sverige 1809 – 1974. Skrifter utgivna av institutet för rättshistorisk forskning grundat av Gustav och Carin Olin. Serien I. Rättshistoriskt bibliotek. Band 35*, (Nordiska bokhandeln i distribution, 1984), p. 216 ff.

6 Häthén (1990), p. 209f.

known that it was the crown prince Oscar who was the author. The booklet supported the cell system, because the author considered it as the only system that successfully could combine a severe punishment with a successful rehabilitation. The liberal opinion of the diet was enthusiastic, and later in 1840 the diet decided to allocate as much as 1.300.000 *Riksdaler* (a very large sum) to the building of provincial prisons modelled on the cell system. In fact it was the Auburn system of the state of New York that worked as a model for the crown prince and which inspired him to write the text.[7]

Sweden was a poor country and its economy was still generally based on income from agriculture. The industrialisation of the country had just begun, and the cities were small and few. Despite this it was possible to allocate a very substantial sum of money to build prisons. This shows us the importance of the criminal system and the criminal problem at that time, and that the Diet considered it as a central mission for the criminal system to be fair, effective and equal for all citizens.

Obviously, the *Riksdag* was worried by the increase in crime. The massive investment in new prisons must be perceived as such, but that concern was also combined with nervousness about the growth of poverty among the agrarian population. Already during the 16th century statutes had been introduced to force landless, unemployed and vagabonds to take service at farms by the threat of being drafted.

During the early 19th century, the anxiety was increased by the violence of the French revolution and the social unrest following the Napoleonic wars. A committee was formed in 1825 to propose new efforts to fight poverty and especially vagrancy. The proposal from 1829 was considered not far-reaching enough and further proposals were required. A statute against vagrancy was introduced in 1833 and it was further amended in 1853. The rules were quite restrictive. Poverty without a decent support was considered as a sign of unlawful laziness, and the provincial authorities could decide to send such persons to forced public work without a sentence from a legal court.

These rules were tightened further in the 1880s. The landless poor were seen as an increasingly dangerous threat to the community, and local governments were given the authority to intervene. In a way we can see this rather as a fight against the poor and not against poverty.[8]

3 Legal reforms in the early 20th century

The right to take part in general elections and to be a candidate was gradually extended to wider groups, and in 1907 suffrage was extended to apply for all men. This gave a stronger

[7] Nilsson, *En välbyggd maskin, en mardröm för själen. Det svenska fängelsesystemet under 1800-talet. Bibliotheca Historica Lundensis 93*, (Lund University Press 1999), p. 198.

[8] Nilsson (1999) p. 200 ff. Snare, *Work, War, Prison, and Welfare. Control of the Laboring Poor in Sweden. Kriminalistisk Instituts Skriftserie No. 4*, (Institute of Criminology and Criminal Law, University of Copenhagen, 2nd ed., 1992) p. 203.

legitimacy to the political bodies, and the lawmaking power was by this time completely in the hands of the *Riksdag*. The principle of rule of law was generally fully accepted even if new and more radical political ideologies started to have influence in the political system. A more radical constitutional development came in 1917, when the political system definitely reduced the monarch to a more symbolic role.[9]

The reforms during the years 1917 to 1920 were implemented within the framework of the old Instrument of Government from 1809, and during the long period to 1974 when the new Instrument of government was implemented, constitutional reform was mainly done by the development of constitutional practise. It is important that these radical changes in the Swedish political system were done without violent and bloody revolutions. This gave the political system a strong continuous legitimacy, and beside other things it made necessary criminal reforms easier to implement. The final abolishment of the capital punishment during peacetime in 1921 must be seen in this context.[10]

The modern theories of criminal law spread to Sweden in the late 19th century and in the early 20th. I am here referring to the sociological school of Franz von Liszt, van Hamel and Prince. The school was quite influential during the first three decades of the 20th century. The positive or biological school of Lombroso and Ferri was of course also well known, but it became important and influential only later in the 1930s.[11]

The ideas of the sociological school were spread by the members of the criminalist movement. These were members of the criminalist societies; professors from the universities, lawyers, judges, and officials from the prison administration met, discussed and listened to presentations of reforms in other countries.

The development in Norway inspired members of the *Riksdag* to demand a reform of the system of penalties and to ask for new rules concerning very young criminals, alcoholics, prostitutes and mentally ill criminals. The left wing liberals also wanted to reform the fining system with the intention of keeping as many petty criminals as possible away from the prison institutions. These ideas had strong support from the criminalist movement.[12]

The criminal law reform became a part of the modernisation of the Swedish state from the 1910s onwards. In 1902, laws introducing compulsory education for young criminals between 15 and 18 were enacted under great political unity. This law gave the courts the right to sentence young offenders to what was in reality a non-time limited punishment. The legislature did not consider the compulsory education as a punishment

9 von Sydow (1997), p. 115 ff.

10 Seth (1984), p. 258 ff.

11 Petersson Hjelm, *Fängelset som välfärdsbygge. Skrifter utgivna av institutet för rättshistorisk forskning grundat av Gustav och Carin Olin. Serien I. Rättshistoriskt bibliotek. Band 68*, (Nerenius & Santerus 2002), p. 139.

12 Kumlien, *Uppfostran och straff Studier kring 1902 års lagstiftning om reaktioner mot ungdomsbrott. Skrifter utgivna av institutet för rättshistorisk forskning grundat av Gustav och Carin Olin. Serien I. Rättshistoriskt bibliotek. Band 56*, (Nerenius & Santerus 1997), p. 314 ff.

in a strict sense, but rather as a pedagogical and social reaction executed through a local administrative board. These childcare laws played a very important role in the development of Swedish criminal law politics – *kriminalpolitik* – and are considered as having been the first step in replacing punishments with individual prevention and treatment. The Norwegian laws, drafted by Bernhard Getz, were an obvious inspiration, but they were not completely copied.[13]

During a period starting in the 1920s and ending in the 1950s, reforms were introduced that drastically changed the Swedish criminal system. This was a period when criminal law politics broadened the spectrum of reactions on crime and the various ways that the Swedish state tried to fight crime. We can give many examples, and some show incapacity in identifying a definitive border between legitimate and acceptable forms of state coercion. Sterilisation was used as a way of treatment and sanction for young women with asocial tendencies from the late 1920s until the late 1960s.[14]

The various instruments of criminal law politics were in use during the time when the Swedish welfare state was definitely established. The ideas of social engineering were highly popular among the left wing political elite that was then in power. This period of change ended with the introduction of the new criminal code in 1965. Many lawyers and politicians were involved in this reform, but especially two names must be given here; the brilliant and influential law professor Johan Thyrén and the judge and politician Karl Schlyter. Both were active for many years; Thyrén from 1909 until his death in 1933, mostly as a source of a number of reform proposals, and Schlyter as Minister of Justice during some formative years in the 1930s, and later as chairman of a committee that worked with the proposals that later would become the new criminal law of 1965. Both had a large international network, and they were well aware of and took part in the international criminal law discussion. Thyrén was more conservative, and he wanted to keep the criminal reform within the boundaries of the principle of rule of law. He strongly believed that the criminal system must have the legitimacy of a strong general public support. Schlyter was more radical, and he was an influential member of the Social Democratic party. He was interested in the theories of the Italian criminalists, and he corresponded with Enrico Ferri. The ideas of Ferri to replace punishments with various sanctions and to accept psychiatrist expertise in the legal courts charmed Schlyter.[15]

During the 1940s and 1950s, a number of reforms were implemented where the state reactions on crime more and more departed from the older, restricted criminal law principles. The state reactions became more individualised, and the situation of the criminal,

13 Kumlien (1997), p. 316 f.

14 Runcis, *Steriliseringar i folkhemmet*, (Ordfront Stockholm 1998), p. 242 ff.

15 Petersson Hjelm (2002), p. 139.

his mental status and professional or educational situation were considered by medical, social or pedagogical expertise. The role of the judges was gradually reduced.[16]

The strong emphasis on the criminal's person and the individualisation of the sanctions gave the state a large number of alternatives in dealing with criminals. What had been strict criminal law practise earlier became administrative and social care instead. The criminal was to be cured and the treatment made to suit his individual needs. In this process the situation of the victims of crime was neglected.

4 A short analysis

In the introduction, I presented the idea that the Swedish development as a modern democratic nation state and the gradual reform and modernisation of its criminal system were closely connected. When Sweden was reinvented as a nation state in the early 19th century, the state powers were limited by the new instrument of government. The old criminal laws were considered as being brutal and ineffective and in need of modernisation, especially because they gave the state the right to exercise brutal violence. In many ways they represented the old absolute dynastic monarchical state. It took some time, but when the liberal ideas became stronger and the drive to modernise the Swedish society really got effective in the mid 19th century, the criminal laws were modernised in a liberal spirit with an obvious respect for the dignity of the individual criminal. The political struggle to abolish the death penalty can also be understood as a way of reducing the rights of the state to use offensively strong coercive powers disregarding the individual human dignity of a citizen.

A new change started in the late 19th century. Left wing liberals and socialists wanted reforms both of the state and of the criminal system. In the early years of the 20th century, the modernisation of the criminal system started, and new aspects of individualisation and social treatments were introduced. After the break-up of the dynastic union with Norway, and after the end of the Great War, the democratisation of the state gained momentum in 1917. The parliamentary system was finally accepted and full and equal franchise was introduced.

In the introduction, I presented the idea that the developments of the democratic nation state did not necessary limit the compelling power of the state. In fact, the new democratic state of the 20th century had less limits than its 19th century forerunner, and its intervention in the life of the individual citizens even became stronger. This was not necessarily done through punishment, but by social, pedagogical or other means. The criminal law was included in the mostly benevolent criminal law politics, but was supplemented and also partially substituted by administrative efforts. It was considered the duty

16 Petersson Hjelm (2002), p. 320 ff.

of the welfare state to see to the well being of the citizens and that the criminal elements were to be treated as deviants.

In the description of the situation in the 19th and 20th century, we have seen that the state could use an increasing amount of coercion to fight poverty and vagrancy. In this, the state could without a court hearing and sentence have reduced an asocial or deviant, but not necessarily criminal citizen, to not much more than a slave labourer bereaved of the most basic civil rights. We have also seen that the threat of sterilisation was used to force some women to accept institutional care where they were kept as in a prison indefinitely. Other women were sterilised because of their supposed asocial behaviour.

The Criminal code of 1965 was built on the principles of individualisation, protection and personal improvement under institutional monitoring, giving the state large and obviously far-reaching powers. At the same time, the discourse of civil rights started to question the rather unlimited power of the benevolent welfare state.

It is very difficult to summarise this topic in just a few words, but let us return to the ideas of Charles Tilly. He described the third and last level of state development as a democratic national state with legitimate state institutions functioning according to the principles of the rule of law. The coercive power built in the nature of the state has become regulated, limited and subject to the control of the generally accepted civil rights. If we turn the Swedish example, we have seen how the constitutional and later democratic reforms of the state interacted with the reforms of the criminal system, improving the conditions of the sentenced criminal and limiting the open coercive power of the state. So far, we can see that the theory and practise are in harmony, but as I see it there are complications.

The parallel development of the social administrative efforts of the Swedish state to control the poor and asocial citizens strengthened the state institutions in their right to intervene quite powerfully into the lives of individual citizens. When the criminal law politics was introduced in the first decades of the 19th century, the coercive achievements of the state also invaded the area where by then traditionally limited criminal system had dominated. The impression is split: On one hand the democratic national state recognises the limits to a coercive criminal system, but on the other hand the criminal law politics and the administrative efforts of controlling some unwanted or troublesome elements among the citizens strengthens the coercive powers of the welfare state much beyond what had been possible earlier.

This final observation makes it necessary to somewhat modify the theory of Tilly, and I think that the example of Sweden is quite representative of more European states in the early to mid 20th century. The emergence of the welfare state gave the state unexpected and wide coercive powers, and this removed some important achievements from the 19th century. This was the situation until the strength of the human rights discourse had gained momentum in the 1970s and 1980s.